



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS-FV-15-0046; FV15-930-1 FIR]

Tart Cherries Grown in the States of Michigan, et al.;

Revision of Exemption Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim rule implementing a recommendation from the Cherry Industry Administrative Board (Board) that revised the exemption provisions under the marketing order for tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin (order). The Board locally administers the order and is comprised of growers and handlers operating within the production area. The interim rule changed the number of years that new market development and market expansion projects are eligible for handler diversion credit from one year to three years. The interim rule also revised the composition of the subcommittee which reviews exemption requests. These changes are intended to encourage handlers to participate

in new market and market expansion activities to facilitate sales and help ensure impartiality during the review process.

DATES: Effective [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or E-mail: Jennie.Varela@ams.usda.gov or Christian.Nissen@ams.usda.gov.

Small businesses may obtain information on complying with this and other marketing order regulations by viewing a guide at the following website:

<http://www.ams.usda.gov/rules-regulations/moa/small-businesses>; or by contacting Antoinette Carter, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Antoinette.Carter@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Order No. 930, as amended (7 CFR part 930), regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This final rule continues in effect the provisions of the interim rule that revised the exemption provisions prescribed under the order. The interim rule changed the number of years that new market development and market expansion projects are eligible for handler diversion credit from one year to three years. The interim rule also revised the composition of the subcommittee which reviews exemption requests. These changes are intended to encourage the use of new market development and market expansion activities to facilitate sales and to help ensure impartiality during the review process. These changes were

unanimously recommended by the Board at its meeting on June 25, 2015.

Section 930.59 of the order authorizes handler diversion. When volume regulation is in effect, handlers may fulfill any restricted percentage requirement in full or in part by acquiring diversion certificates or by voluntarily diverting cherries or cherry products in a program approved by the Board, rather than placing cherries in an inventory reserve.

Section 930.159 of the order's administrative rules specifies methods of handler diversion, including using cherries or cherry products for exempt purposes prescribed under § 930.162. Section 930.162 establishes the terms and conditions of exemption that must be satisfied for handlers to receive diversion certificates for exempt uses. Section 930.162(b) defines the activities which qualify for exemptions under new market development and market expansion and the period for which they are eligible for diversion credit. New market development and market expansion activities include, but are not limited to, sales of cherries into markets that are not yet commercially established, product line extensions, or segmentation of

markets along geographic or other definable characteristics.

Section 930.162(d) establishes a Board-appointed subcommittee to review the applications for exemption or renewal of exemption and to either approve or deny the exemption. Prior to this change, this section specified that the subcommittee consist of three members, including the Board manager, or a Board member acting in the manager's stead, the public member, and one industry person who is not on the Board.

The order provides for the use of volume regulation to stabilize prices and improve grower returns during periods of oversupply. At the beginning of each season, the Board examines production and sales data to determine whether a volume regulation is necessary and, if so, announces free and restricted percentages to limit the volume of tart cherries on the market. Free percentage cherries can be used to supply any available market, including domestic markets for pie filling, water packed, and frozen tart cherries. Restricted percentage cherries can be placed in reserve or be used to earn diversion credits as prescribed in §§ 930.159 and 930.162 of the order's administrative

rules. These activities include, in part, the development of new products, new market development and market expansion, the development of export markets, and charitable contributions.

In 2012, the Board made a series of changes to the volume control provisions to facilitate the marketing of tart cherries and to help lower restrictions during seasons when volume control is implemented. One of these changes was to decrease the number of years that new market development and market expansion projects are eligible for handler diversion credit from three years to one year. The Board thought this decrease would continue to encourage new market development and market expansion projects while reducing the impact these credits had on volume restriction calculations. At that time, new market and market expansion sales were not included in the average sales figure used to determine optimum supply for volume regulation. The Board anticipated the change would shift more volume to sales, helping to reduce the calculated surplus and lower the restricted percentage.

In revisiting this change, the Board recognized that the underlying rationale for having reduced the duration of diversion credit for new market development and market expansion was no longer an issue. Since that change, the method for calculating average sales for the purpose of volume regulation has been adjusted so that only export sales are excluded from the average sales calculation. Consequently, all sales from market development and market expansion activities are now included as sales when calculating a restriction. Therefore, increasing the number of years new market development and market expansion projects are eligible to receive diversion credit from one year to three years will not significantly impact the calculations for free and restricted percentages.

Further, since limiting these activities to one year, participation in new market development and market expansion activities has dropped dramatically. In years prior to changing from three years to one year, applications for new market activities numbered around 20 to 25 a season. During the 2014-15 season, the first season with volume regulation under the one-year limitation, applications dropped to eight. Handlers stated

that it was not worth the time and effort to develop one of these projects if the benefit was only for a single year. It was reported that the shortened time frame did not allow handlers to recoup the resources needed to establish one of these projects.

The Board affirmed its support for new market development and market expansion diversion credit programs. Accordingly, the Board voted unanimously to change the exemption provisions applicable to handler diversion activities by increasing the number of years that new market development and market expansion activities are eligible for diversion credit back to three years. The Board also noted that projects approved for the 2014-15 season would be allowed to continue and be subject to the new three-year cycle.

This action also continues in effect a revision to the composition of the subcommittee appointed to review exemption applications. The subcommittee was formed to assist Board staff members in reviewing and granting exemptions. The subcommittee reviews applications to use restricted cherries for activities related to new product

development, new market development and market expansion, the development of export markets, and for experimental purposes. Prior to this change, the previous provisions (§ 930.162(d)) stated that the subcommittee consists of the manager of the Board or a Board member acting in their stead, the public member, and one industry member who is not on the Board. The Board recommended changing the composition of the subcommittee to help ensure impartiality so that no one affiliated with a handler was part of the review process.

Consequently, the Board recommended revising the subcommittee to consist of three members, all of whom are not affiliated with a handler but have industry knowledge. One of these members shall be the public member or the alternate public member, if available to serve. The subcommittee will also include a similarly qualified alternate should one of the other members be unable to serve.

The Board made several other recommendations for changes to the regulations under the order at its June 25, 2015, meeting. These changes are being considered under a separate action.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 600 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$750,000 and small agricultural service firms have been defined as those having annual receipts of less than \$7,500,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service and Board data, the average annual grower price for tart cherries during the 2014-15 season was \$0.35 per pound, and total utilization was around 300 million pounds. Therefore, average receipts for tart cherry producers were around \$175,800, well below the SBA threshold for small producers. In 2014, The Food Institute estimated an f.o.b. price of \$0.96 per pound for frozen tart cherries, which make up the majority of processed tart cherries. Using this data, average annual handler receipts were about \$6.9 million, which is also below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

This final rule continues in effect the action that revised § 930.162 of the regulations regarding exemptions by changing the number of years that new market development and market expansion projects are eligible for handler diversion credit from one year to three years. This rule also continues in effect the revision to the composition of the subcommittee which reviews exemption requests. These changes are intended to encourage the use of new market

development and market expansion activities to facilitate sales and to help ensure impartiality during the review process. The authority for these actions is provided in § 930.59 of the order.

It is not anticipated that this action will impose additional costs on handlers or growers, regardless of size. Rather, this should help handlers receive better returns on their new market development and market expansion projects by providing additional time for the handlers to receive diversion credit for those activities. This should provide more opportunity for them to recoup the time and resources required to establish these projects.

In addition, changing the number of years that these projects are eligible for diversion credits may provide additional incentive for handlers to develop these programs and may facilitate additional sales, which could improve returns for growers and handlers. Further, the Board does not believe that this change significantly impacts the calculations for free and restricted percentages.

The change in composition of the subcommittee is administrative in nature and is not expected to result in any additional costs.

This rule is expected to benefit the industry. The effects of this rule are not expected to be disproportionately greater or less for small handlers or producers than for larger entities.

The Board discussed alternatives to these changes, including not changing the number of years that new market development and market expansion projects were eligible for diversion credit. The Board agreed that increasing the number of years that new market development and market expansion projects are eligible for diversion credit from one year to three years provides handlers with more incentive to utilize these programs while not impacting the calculations for free and restricted percentages.

Another alternative considered was maintaining the previous composition of the subcommittee responsible for reviewing exemption requests. However, the Board wanted to specify that the subcommittee be composed of members who are not affiliated with any handler. Therefore, for the reasons mentioned above, these alternatives were rejected.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of

Management and Budget (OMB) and assigned OMB No. 0581-0177, (Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin). No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule. Further, the public comment received concerning the proposal did not address the initial regulatory flexibility analysis.

In addition, the Board's meeting was widely publicized throughout the tart cherry industry, and all interested persons were invited to attend and participate in Board deliberations on all issues. Like all Board meetings, the

June 25, 2015, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue.

An interim rule concerning this action was published in the **Federal Register** on November 5, 2015, (80 FR 68424) and was effective November 6, 2015. Copies of the rule were sent via e-mail to all Board members and tart cherry handlers. Finally, the rule was made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending January 4, 2016, was provided to allow interested persons to respond to the proposal.

One comment was received during the comment period in response to the interim rule. The commenter, a producer, supported part of the action but offered an alternative to the membership of the subcommittee.

The commenter supported the expansion of handler diversion credits for new market development and market expansion projects from one year to three years. The commenter agreed with the Board's finding that it will encourage growth in the industry.

Regarding the change to the membership of the approval subcommittee, the commenter suggested that membership

should be further modified to include cherry growers that are not also handlers. However, the Board's intent in making the revision to the subcommittee requirements was, in part, to ensure impartiality. Consequently, the Board recommended that the subcommittee be composed of members who are not affiliated with any handler. Even growers who are not handlers themselves have a business relationship with the handlers to which they sell.

The additional points in the comment were not relevant to the interim rule. Accordingly, no changes will be made to the interim rule, based on the comment received. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule, without change.

To view the interim rule and the comment that was received, go to:

<http://www.regulations.gov/#!docketDetail;D=AMS-FV-15-0046>

This action also affirms information contained in the interim rule concerning Executive Orders 12866, 12988, 13175, and 13563; the Paperwork Reduction Act (44 U.S.C. Chapter 35); and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim rule, without change, as published in the **Federal Register** (80 FR 68424, November 5, 2015) will tend to effectuate the declared policy of the Act.

List of Subjects

7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

Accordingly, the interim rule that amended 7 CFR part 930 and that was published at 80 FR 68424 on November 5, 2015, is adopted as a final rule, without change.

Dated: April 12, 2016

Elanor Starmer
Administrator
Agricultural Marketing Service

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